No. 90-1014

In The

Supreme Court of the United States

October Term, 1990

ROBERT E. LEE, Individually and as PRINCIPAL OF NATHAN BISHOP MIDDLE SCHOOL, et al.,

Petitioners,

v.

DANIEL WEISMAN, etc.

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF THE SOUTHERN BAPTIST CONVENTION CHRISTIAN LIFE COMMISSION AS AMICUS CURIAE SUPPORTING PETITIONERS

MICHAEL K. WHITEHEAD
(Counsel of Record)
General Counsel
CHRISTIAN LIFE COMMISSION
400 North Capitol Street, N.W.
Washington, D.C. 20001
202-638-3223
FAX 347-3658
Attorney for Amicus Curiae

Of Counsel:
JAMES M. SMART, JR.
CREWS, SMART, WHITEHEAD & WAITS
401 W. 89th Street
Kansas City, Missouri 64114
816-363-5466
FAX 333-1205
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This brief is being filed with the written consent of counsel for both the petitioners and the respondents, which consents have been filed with the clerk of the Court.

INTEREST OF THE AMICUS CURIAE

The Christian Life Commission is the moral concerns and public policy agency for the Southern Baptist

Convention, the nation's largest Protestant denomination, with over 15 million members in nearly 38,000 local churches. The Christian Life Commission also has an assignment from the Convention to address matters of religious liberty.

Southern Baptists have a significant interest in the issues presented in this case. This case involves the Religion Clauses of the First Amendment, and Baptists have always been deeply involved in promoting and protecting the principle of religious liberty, including the separation of the institutions of the Church and State. Indeed, this case arises in Rhode Island, which was founded by Baptist Roger Williams in his search for religious liberty.

This case also involves public education, and Southern Baptists have a longstanding commitment to local public schools. Many Southern Baptist parents have served on local school boards. Many have worked as teachers and administrators in public schools. Most Southern Baptist parents have chosen to educate their elementary and secondary school children in their local public schools. Many of our pastors are invited regularly to speak and to pray at public ceremonies, such as the graduation ceremony in this case. Thus, Southern Baptists are vitally interested in the public policies involving religious freedom and public education, and both parents and pastors will be affected by the outcome of this case.

STATEMENT OF THE CASE

The School Committee of Providence, Rhode Island, has for many years chosen to include in the annual

graduation ceremony for its junior high and high schools, an invocation and a benediction by local clergy. School principals perform the administrative task of rotating the invitation to clergymen of various faiths. The schools provide the clergy with guidelines for the ceremonies prepared by the National Conference of Christians and Jews, which stress inclusiveness and sensitivity in authoring prayer for civic ceremonies. In 1989, at a middle school commencement, Rabbi Leslie Gutterman gave the invocation and benediction, which were described later by the district court judge as "examples of elegant simplicity, thoughtful content and sincere citizenship."[1] Pet. Brief for Cert. at Appendix 20a, 21a.

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[1] Invocation: God of the Free, Hope of the Brave: For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it. For the liberty of America, we thank You. May these new graduates grow up to guard it. For the political process of America in which all its citizens may participate, for its court system where all can seek justice, we thank You. May those we honor this morning always turn to it in trust. For the destiny of America, we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it. May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled. Amen

Benediction: O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement. Happy families give thanks for seeing their children achieve an important milestone. Send Your blessings upon the teachers and administrators who helped prepared them. The graduates now need strength and guidance for the future. Help them to understand

(Continued on following page)

The district judge held that the Establishment Clause prohibited the graduation prayers, under the three-part test formulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).[2] In announcing that graduation prayer inherently advances religion, the district judge used some chilling words:

> "Since the landmark 1962 decision of *Engel v. Vitale* 370 U.S. 421 (1962), . . . God has been ruled out of public education as an instrument of inspiration or consolation." Pet. App. 21a. " . . . [I]f Rabbi Gutterman had given the exact same invocation . . . with one change – God would be left out – the Establishment Clause would not be implicated. The plaintiff here is contesting only an invocation or benediction which invokes a deity or praise of a God. (Pet. App. 21a.)
>
> "The fact is that an unacceptably high number of citizens who are undergoing difficult times in this country are children and young people. School-sponsored prayer might provide hope to sustain them, and principles to guide them in the difficult choices they confront today. But the Constitution as the Supreme Court views it does not permit it. . . . Those who are

(Continued from previous page)

that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: To do justly, to love mercy, to walk humbly. We give thanks to You, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion. Amen.

[2] Chief Justice Burger wrote for the majority: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion."

> anti-prayer thus have been deemed the victors. That is the difficult but obligatory choice this Court makes today." (Pet. App. 29a)

The First Circuit Court of Appeals adopted the opinion of the district judge.

SUMMARY OF ARGUMENT

Traditional invocations and benedictions at public ceremonies do not violate the Establishment Clause, because they are non-coercive accommodations of the religious needs of the community and its student population. Government accommodation of religious speech facilitates the exercise of beliefs and practices independently adopted, rather than inducing or coercing beliefs and practices acceptable to government. Such accommodation does not interfere with the religious liberty of non-adherents by forcing them to participate in the prayers. The accommodation does not favor one form of religious belief over another.

ARGUMENT

ACCOMMODATION OF RELIGIOUS PLURALISM IS A PUBLIC VALUE WHICH SHOULD BE TAUGHT IN PUBLIC EDUCATION.

Has God been ruled out of public education?

The decision of the district court says bluntly that current Establishment Clause doctrine prohibits the word

"God" from utterance in a graduation invocation or benediction, because "God has been ruled out of public education . . . " and "(t)hose who are anti-prayer have thus been deemed the victors." Id., 21a, 29a.

The district judge's opinion virtually cries out for reversal, so that public schools might be spared from the "obligatory choice" made by the court. Pet. App. 29a. Compelled to apply the tripartite test to its logical conclusion, the court felt it was forced to hold that every public school function must be absolutely secular – without a prayer, and without one unutterable word – "God."

The Values-Inculcation Mission of Public Schools.

The public schools are supposed to be our nation's training ground for the knowledge and values which will produce good citizenship and character. In *McCollum v. Board of Education*, 333 U.S. 203 (1948) at 231, the Court said: "The public school is at once the symbol of our democracy and the most persuasive means for promoting our common destiny."[3] The Court has affirmed the role of public schools as "a principal instrument in awakening the child to cultural values" [*Brown v. Board of Education*, 347 U.S. 483, 493 (1954)]; of "inculcating fundamental

[3] John Whitehead, RIGHTS OF RELIGIOUS PERSONS IN PUBLIC EDUCATION, 209-210 (1991). See also Justice William Brennan, *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). "The classroom is peculiarly 'the marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues,' (rather) than through any kind of authoritative selection."

values necessary to the maintenance of a democratic political system" [*Ambach v. Norwick*, 441 U.S. 68, 77 (1979)]; and as a tool to transmit "community values." [*Board of Educ. v. Pico*, 457 U.S. 853, 864 (1982)].

As we approach the twenty-first century, the crisis in American public education is recognized to be both academic and moral. Literacy and aptitude scores decline while drug abuse, sexually-transmitted disease, teenage pregnancy, and violence increase. School officials struggle desperately to teach academics and values, while also striving to keep schools relentlessly secular, as the *Lemon* test seems to require. But relentless secularism also violates the Establishment Clause. In a 1981 report concerning lawlessness in American culture, former Chief Justice Warren Burger opined: "Possibly some of our problem of behavior stems from the fact that we have virtually eliminated from public schools and higher education any effort to teach values of integrity, truth, personal accountability and respect for other's rights."[4]

Public Schools – Training Americans to be Tolerant Citizens.

Professor Michael McConnell has observed that "individual choice in religion is a public value; the state itself is religiously pluralistic – not secular."[5] One of the values which public schools should transmit is respect

[4] *Annual Report to the A.B.A. by the Chief Justice of the United States*, 67 A.B.A.J. 291 (1981).

[5] M. McConnell, *Accommodation of Religion*, Sup. Court Rev., 1985, page 41.

and tolerance for the religious choices of others. Pluralism is promoted by exposing children and adults to differing religious beliefs and practices in a community, in a respectful, accommodating way. When school officials show respect and tolerance for the religious diversity of the community, they promote this public value. This enriches the educational experience and builds understanding and respect. Just as racial harmony cannot grow in the soil of racial segregation, neither can religious harmony spring up in a system of "religious apartheid."[6]

The courts below, applying *Lemon*, hold that the public institution whose goal is to teach good citizenship and tolerance cannot itself tolerate prayers at public meetings, for fear that this might have the "primary effect" of advancing or endorsing religion. Many parents and teachers have retreated from public schools, in part because they refuse to accept the "absolutely secular" model. They perceive a "brooding and pervasive devotion to the secular, and a passive, and even active, hostility to the religious."[7] If the trend of strict separationism continues, many more Americans may seek greater "educational choice" to find a more tolerant alternative, and public school enrollment will continue to decline.

By giving all religious views represented in the community and its student population an equal opportunity to participate in invocations and benedictions, the public

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[6] Whitehead, *supra*, page 33.

[7] Associate Justice Arthur Goldberg, *Abington School District v. Schempp*, 374 U.S. 203, 306 (1963).

school system encourages freedom of religious choice. Parents and students are less likely to feel compelled to seek alternative education systems in order to find religious liberty, if they find accommodation and respect in public education.

Many parents and students believe that all knowledge has a unifying source in a personal God; that all truth is God's truth; and that the ultimate aim of education is to know God personally. For these Americans, there is no such thing as "secular" knowledge or "value-neutral education." To have mandatory school attendance laws, but to make no accommodation for this viewpoint, amounts to a denial of equal protection of the laws for these parents and their children.

Religious speech is still protected speech.

Another serious public value at risk in this case is freedom of speech. Please note that the district judge's opinion says that the rabbi's speech would have been lawful, but for a certain word, "God." Presumably if the word had been uttered as a curse or in vain, there would have been no Establishment Clause issue. However, since the rabbi was obviously sincere in believing he was addressing a personal God, the words have become a prayer, and inherently "religious," and therefore impermissible. It is as though religious speech at a public function is a sort of "super-obscenity," which is unprotected by the Free Speech Clause.

Time to reverse the trend.

The Supreme Court has already begun to reverse the trend, to uphold choices developed by families, working

through their local school boards, for non-coercive ways to accommodate the religious and moral needs of public school students. *Mergens v. Westside Community Schools*, 110 S.Ct. 2356 (1990), clearly established the principle of equal access to facilities for student-led, student-initiated religious expression during a limited open forum in a public high school. Upholding graduation prayer in this case would be another step in the right direction, to correct the mistaken perception that public schools must always discriminate against religious expression, even by private citizens in after-hours voluntary programs.

ACCOMMODATION WITHOUT COERCION IS THE GOAL OF RELIGION CLAUSES.

There is widespread agreement that the Establishment Clause and the Free Exercise Clause have as their common ultimate goal the protection of religious liberty.[8] Professor McConnell's article, *Coercion: The Lost Element of Establishment*, 27 Wm. & Mary L. Rev. 933 (1986) makes clear that the primary good of the religion clauses is freedom of religious choice, and the primary evil is government coercion which interferes with religious choice. Religious liberty includes both individual choice of religious belief and practice, and autonomy of religious organizations from government interference.

Accommodation of religious liberty by public school officials helps fulfill the values-inculcation mission. As the Court stated in *Zorach v. Clauson*, 343 U.S. 306, 313-14, (1952):

[8] M. McConnell, *Accommodation, supra*, p.1.

> "When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs."

Establishment Clause protects religious choice from official coercion.

The Establishment Clause protects religious liberty by preserving religious pluralism, free from government interference which might distort religious choice. Prior to 1962, it was generally agreed that a major aim of the Establishment Clause, as stated in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), was to "forestall compulsion by law of the acceptance of any creed or the practice of any form of worship."

In *Engel v. Vitale*, 370 U.S. 421, 430 (1962), the Court struck down a school board rule requiring the New York Board of Regents prayer[9] to be repeated daily aloud by each class. For the first time, the Court said that freedom from coercion of conscience was not the primary interest being served:

> "The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct government compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate to coerce non-observing individuals or not."

[9] "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country."

The *Lemon* Test ignores the element of coercion.

The *Lemon* test does not consider the element of official coercion which would interfere with religious pluralism. It does not provide clear guidance to officials and courts who must draw lines between permissible accommodations of religion and impermissible benefits to religion.

Consistency has not been a hallmark of the *Lemon* test. It has been used to prohibit the display of a poster listing the Ten Commandments in Kentucky classrooms, *Stone v. Graham* 449 U.S. 39 (1980). Yet, in *Lynch v. Donnelly*, 465 U.S. 668 (1984), Chief Justice Rehnquist observed that "The very chamber in which oral arguments on this case were heard is decorated with a notable and permanent – not seasonal – symbol of religion: Moses with the Ten Commandments." 465 U.S. at 677. School children who regularly tour and observe the chambers of our highest court should learn, as educated citizens, that the Ten Commandments provide the foundation for the legal and moral code for Western Civilization, and that they are rooted in Judeo-Christian history. The fact of religious origin and the presence of religious words should not have voided the Kentucky law. In *Lynch*, the Court side-stepped *Lemon* and upheld a nativity scene display by the city of Pawtucket, Rhode Island. But in *County of Allegheny v. A.C.L.U.*, 109 S.Ct. 3086 (1989), the Court upheld a government display including a menorah, while prohibiting a government display of a creche, citing *Lemon* as the basis for both holdings.

***Lemon* Test promotes secularism, not religious pluralism.**

The very formulation of the *Lemon* test seems to obscure the value of religious liberty. The legislative purpose must be secular. The primary effect must be secular, neither advancing nor inhibiting religion. Insisting on a secularizing purpose, and permitting only secular effects makes the test inherently hostile to religious liberty.

The Establishment Clause separates the institutions of Church and State, but it does not separate the influence of religion and morality from government. If the Establishment Clause prohibited government from expressing benevolent regard for religion, then the Free Exercise Clause would have been the first violation of the Establishment clause. The Free Exercise clause is clearly official action affirming the inherent value and good of religious liberty, so that its free exercise is to be among the first freedoms to be protected in our Bill of Rights.

Lemon seeks to create a vacuum in the public square by excluding everything that is religious. But nature abhors a vacuum, and emptying the public square of religious content does not create a neutral zone. Instead, the secularism which fills the public square brings its own non-theistic values which are antithetical to religion, and intolerant of religious pluralism.

Accommodation of Religion includes religious speech.

An Establishment Clause test should be reformulated to allow official accommodations, but not official endorsement, of religious speech. Unlike *Lemon*, this case does not involve direct government financial aid, and the

Court may save for another day the reformulation of the special aspects of the test which pertain to financial benefits. But in any event, the Establishment Clause test should have as its goal the promotion of religious pluralism as a public value, and the protection of individual choice and institutional autonomy from government coercion and interference. A test based on these principles, would include the following:[10]

> I. Does the official accommodation facilitate the exercise of religious beliefs and practices, adopted through private, family, church and community influences, independent from State influence, rather than inducing or coercing beliefs and practices acceptable to the government?
>
> II. Does the accommodation interfere with the religious liberty of others by forcing them to participate in religious observance?
>
> III. Does the accommodation favor one form of religious belief over another?[11]

Graduation prayers are non-coercive.

In the present case, the graduation prayers facilitate the exercise of longstanding, traditional practice by

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[10] M. McConnell, *Accommodation*, pages 35-39.

[11] Another element to consider when financial aid cases are reviewed might be: "IV. Does the accommodation use the government's taxing power, or is expenditure of public funds structured so the effect will be 1) to induce, coerce or distort individual religious choice, or 2) to interfere with the religious autonomy of a religious institution, or 3) to promote religion, or discriminate against a religion, by providing a direct subsidy to religious indoctrination of belief." See *Walz v. Tax Commission*, 397 U.S. 664 (1970).

religious groups in the community. No public official is praying or prescribing the content of any prayer.[12] No public funds are paying for the prayer. The mandatory attendance laws, which compelled the *Engel* students to be a captive audience during the school day, do not require attendance at this voluntary, after-hours, civic program, where family and friends are present. No one is pressured to participate. No reasonable person should feel like an "outsider" or a "second class citizen" if he does not believe or participate in the brief prayers in the program. Any person who does not wish to participate is free to remain silent, think about other things, or even excuse himself from the room for the 30-45 seconds the prayer may last. The prayers are a minuscule portion of an otherwise wholly secular program. Any appearance of endorsement by officials is offset by the non-preferential nature of the forum. The Solicitor General has correctly observed: "In short, whatever special concerns about subtle coercion may be present in the classroom setting – where inculcation is the name of the game – they do not carry over into the commencement setting, which is more properly understood as a civic ceremony than part of the educational mission." Brief for the United States as Amicus Curiae on Petition for Writ of Certiorari, page 18. Finally, the school principal did not discriminate against certain religions in his rotation of invitations to various religious leaders in the community.

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[12] The district court judge described this as "school-sponsored prayer" which might help students. Pet. App. 29a. While we agree with his assessment of the value of prayer, we disagree that this private prayer is "school-sponsored," but rather it is school-accommodated.

The Sixth Circuit Court of Appeals made similar findings in *Stein v. Plainwell Community Schools*, 822 F.2d 1406 (6th Cir. 1987), upholding historic, traditional invocations and benedictions at public school graduation ceremonies. The *Stein* court considered that the tradition of including an invocation and benediction to solemnize this rite of passage predates the founding of the American republic.[13] The court compared these facts to *Marsh v. Chambers*, 463 U.S. 783 (1983) and *Lynch v. Donnelly*, 465 U.S. 668 (1984), in which the Supreme Court found historical tradition and practice to be relevant to Establishment Clause analysis. Traditional religious expressions or symbols in civic ceremonies, especially those which are similar to practices in the era of the Founding Fathers, should not be held to violate the Establishment Clause apart from a finding of some government coercion.

Free Speech and Equal Protection.

The Religion Clauses should protect freedom of choice, including those who choose unbelief. Persons who disagree with the content of the prayer have a right to their opinion, but they should not have the right to

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[13] J. Whitehead, *supra*, 209-210 (1991). "The first graduatioin services began in Oxford, England, as early as the twelfth century. In America, the tradition began at Harvard in 1642. The program consisted of a prayer by the president of the institution and addresses by members of the graduating class. Commencement exercises in public high schools were not started until 1842. The high schools primarily copied the university format." See also the discussion that Thomas Jefferson saw no Establishment Clause violation by the traditional practice of commencement prayer at public schools.

force their opinion on others, by asking government to censor all public religious expression which they claim offends them. In the Free Speech arena, even the most hateful speech must be tolerated, even though a listener may claim to be offended.[14] Surely, religious speech cannot be relegated to some lower standard, to some super-obscene standard, so that "religious words" in a prayer must be prohibited if anyone claims "offense". This hardly promotes religious pluralism, tolerance, and the common good.

In *Widmar v. Vincent*, 454 U.S. 263 (1981), Justice White based his dissent in part on a distinction between religious speech, which he said was protected in school buildings, and religious worship, which he said was not protected. (White, J., dissenting at page 283-86) The majority disagreed, noting that this distinction would entangle officials and courts in the scrutiny of words, motives and religious significance by religious groups, to discern what words were mere speech, and what words were religious worship. *Widmar, supra*, at 269-70, note 6; 272 note 11.

Suppose, for example, that the minister had read during the invocation from the presidential proclamation, calling for prayers of thanksgiving for the success of Operation Desert Storm in the Persian Gulf.[15] Would references to the "Heavenly Father" and the "Lord" in the proclamation, and quotations from the Old Testament, be

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[14] *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Cohen v. California*, 403 U.S. 15 (1971).

[15] Presidential Proclamation No. 6257, March 7, 1991.

impermissible as "prayer," or as "sectarian" religious words?

It should be noted that, according to the lower court record, the rabbi was invited without any direct instruction from the school to pray, or how to pray. Pet. App. 19a. The private speaker controlled the content of the speech. This is as it should be. The school board certainly should not involve itself, in the name of avoiding establishment problems, in policing the content of the speech or prayer. See *Marsh, supra,* at 794 ("The content of the prayer is not of concern to judges.") It should be left to the manners of the private speaker to be gracious and sensitive to the pluralistic nature of his audience.

Your amicus urges this Court not to adopt that part of the *Stein* holding which protected the prayer only so long as the words were "non-denominational" or "non-sectarian." It does not promote religious pluralism for government to permit speech only about a generic "brand-X" God. If a Baptist preacher is prohibited from praying "in the name of Jesus Christ," or a rabbi prohibited from praying to "Jehovah," the state has gone too far, and now truly infringes on religious conscience. The price for participation in community life would be too high if it requires a legal gag on the religious conscience of the speaker. The value of religious pluralism must neither be sacrificed on the altar of merely civil religion, nor abandoned in the arid, hostile desert of stifling secularism.

CONCLUSION

The State is to be religiously pluralistic – not secular. This Court can advance this value by restoring freedom of religious choice as the touchstone of the Religion Clauses, and by protecting religious expression in civic ceremonies so long as official coercion is absent.

Truly, public schools in America "do not have a prayer," if the one unmentionable word at public school functions is "God." The opinion below poignantly serves up the sour fruit which the *Lemon* tree has borne. This Court is now presented with a compelling occasion, not to just revise and sweeten *Lemon,* but to uproot and replace it with an Establishment Clause doctrine which will promote religious liberty rather than obliterate it.

The judgment of the Court of Appeals should be reversed.

MICHAEL K. WHITEHEAD
(Counsel of Record)
General Counsel
CHRISTIAN LIFE COMMISSION
400 North Capitol Street, N.W.
Washington, D.C. 20001
202-638-3223
FAX 347-3658
Attorney for Amicus Curiae

Of Counsel:
JAMES M. SMART, JR.
CREWS, SMART, WHITEHEAD & WAITS
401 W. 89th Street
Kansas City, Missouri 64114
816-363-5466
FAX 333-1205

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